EAGLE ONE INVESTMENT LTD & ORS v. ASIA PACIFIC HIGHER LEARNING SDN BHD

COURT OF APPEAL, PUTRAJAYA
AHMADI ASNAWI JCA
AB KARIM AB JALIL JCA
SURAYA OTHMAN JCA
[CIVIL APPEAL NO: B-02(NCVC)(W)-74-01-2018]
16 JANUARY 2020

TORT: *Defamation – Publication – Publication of article on website – Whether defamatory – Whether gave rise to impression that complainant was involved in corrupt practice – Whether caused loss of reputation – Whether article referred to complainant – Whether complainant's recourse was on action for malicious falsehood – Whether article satisfied test for defamatory imputation – Whether imputation tended to lower complainant in estimation of right-thinking members of society – Whether article referred to complainant – Whether published to third party*

The respondent ('plaintiff') was a private limited company and was the registered owner and license holder of Lincoln University College ('LUC') and the first appellant ('first defendant') was the owner of an online news portal, *www.antdaily.com*, established by the second appellant ('second defendant'). The third appellant ('third defendant'), a writer working for the first and second defendants, wrote an article entitled 'Paid Holiday Part Of MMC Evaluation Visit' which was published in the *antdaily* website. The plaintiff claimed that the article was deemed to be defamatory of the plaintiff, giving rise to the impression that the plaintiff was involved in corrupt practice and giving bribes in the form of sponsoring paid holidays to get recognition for LUC's medical program from the Malaysian Medical Council ('MMC'). As a result of the defamatory article, the plaintiff suffered a loss of reputation resulting in loss of potential students and lowering of LUC students' moral and staff. The sole issue before the High Court Judge ('HCJ') was whether the article as read was defamatory and led to the imputation as alleged by the plaintiff. The HCJ found, *inter alia,* that the article was written by the third defendant and published online in the *antdaily* website, a publication launched and managed by the first and second defendants and that there was no dispute that the article referred to the plaintiff. Hence, the HCJ concluded, *inter alia*, that the article was written with malice to tarnish and lower the image of LUC in the eyes of the public and was an example of irresponsible and unprofessional journalism. The article was held to have successfully tainted the image of LUC which had resulted in a serious loss to LUC. Hence, this appeal. The defendants submitted that the article was all about LUC and not the plaintiff and that

there were no evidence led in the trial by the plaintiff to show that the article referred to the plaintiff nor were there any evidence to show that LUC and the plaintiff were one and the same. Additionally, the defendants submitted that the plaintiff failed to plead as to how the article had referred to 'Asia Pacific Higher Learning Sdn Bhd' and the pleadings clearly showed a lack of nexus between the plaintiff and LUC, other than that LUC was owned by the plaintiff.

Held (dismissing appeal on liability; varying quantum of damages)
Per Ahmadi Asnawi JCA delivering the judgment of the court:

(1) The essence of the defendants' contention that the said article did not refer to the plaintiff and that LUC ought to be the proper plaintiff, leaving the plaintiff with no *locus* to institute the action against the defendants, was not pleaded at all. At all material times, the defendants had never brought up this issue, neither in its defence nor in the course of trial. It was raised for the first time only in the present appeal. In order for the defence to raise the issue that the plaintiff's action was not maintainable on account of want of *locus*, it being the incorrect entity to sue, it was incumbent upon the defendants to mandatorily specify in their pleadings the alleged facts or acts leading to the said deficiency. (paras 20 & 21)

(2) There was nothing in the defendants' pleading resembling the requirements of O. 18 r. 8(1)(a) and/or (b) of the Rules of Court 2012 ('ROC'), contrary to the averments for the defendants that paras. 8 and 20 of the 'Pembelaan Terpinda Defendan-Defendan' were sufficiently exhaustive to meet the said requirements of the court rules. The paragraphs were standard general denials of the plaintiff's claim, clearly devoid of specific details of the facts or issues leading to the premise that the plaintiff had no *locus* to institute the action against the defendants or that the plaintiff was not the correct entity to sue. There was simply non-compliance of the requirements specified under O. 18 r. 8(1)(a) and/or (b) of the ROC. (paras 24-26)

(3) The defendants, by raising the issues only at the appellate level, were actually trying to appeal on issues that had never been earlier pleaded nor deliberated upon and, in doing so, was creating or inventing a new defence. It caught the plaintiff off-guard and had deprived the plaintiff the opportunity to make known its case in full as questions in relation to *locus* were never directed to its witnesses and such issues were never raised in the course of the full hearing. Hence, this was not a proper case for the court to exercise its discretion in favour of the defendants. It would have created a new defence for the defendants over which the plaintiff would not have been able to respond comprehensively. It would also have amounted to a transgression of the elementary principle of law that parties in litigation are bound by their pleadings. (paras 31

& 32)

(4) The defendants' contention that the plaintiff had no *locus* to institute an action for defamation against the defendants and that its only recourse laid primarily on an action for malicious falsehood was without merit. Both causes of action, defamation and malicious falsehood, which are distinct causes of action, are valid options available to corporate bodies to choose from to protect its trading reputation against parties determined, whether intentionally or otherwise, to tarnish the same. The plaintiff had rightfully instituted and maintained such action for defamation against the defendants. Since the plaintiff did not plead nor make any claim for damages to its injured trade reputation based on malicious falsehood, the natural consequence was that the plaintiff was estopped and thus could not rely and was not entitled to claim the same under that cause of action. (paras 50 & 51)

(5) The impugned article was defamatory in nature or otherwise had carried a defamatory imputation against the plaintiff. It had satisfied the requirements of the three tests of what amounted to defamatory imputation. Viewed objectively, it was most likely that a reasonable man would understand the article in a defamatory way. The article was riddled with unverified facts, falsity, inaccuracies, false statements and so forth, designed to draw an unfavourable impression of the plaintiff and lower the plaintiff in the estimation of right-thinking members of society generally. (para 65)

(6) The defendants did not dispute that the impugned article referred to the plaintiff or was published 'of the plaintiff' but LUC. The evidence showed that LUC was established pursuant to the Private Higher Educational Institutions Act 1996. The plaintiff company was incorporated to establish LUC and was the registered owner and license holder of LUC as required under the Act. Hence, any monetary damage suffered by LUC due to the injury to its trade reputation was wholly suffered by the plaintiff. Further, having regard to the peculiar relationship between LUC *vis-à-vis* the plaintiff, the article would reasonably lead those acquainted with the plaintiff to invariably conclude that the impugned article indeed referred to the plaintiff. There appeared to be a concession by the defendants that the said article was published by the defendants to a third party and hence, this element was proven. (paras 71-73, 77, 79 & 82)

(7) In respect of the quantum of damages, the award handed down by the HCJ was on the high side in all the circumstances of the case and there appeared to have been no basis to justify the amount. Therefore, the defendant's appeal in respect of the same was allowed and the quantum of damages were varied and substituted with: (i) general damages reduced to RM500,000; and (ii) exemplary damages reduced to

A RM300,000. (paras 84 & 85)

Case(s) referred to:

Dato' Tan Chin Woh v. Dato' Yalumallai V Muthusamy [2016] 8 CLJ 293 FC ***(refd)***

Government Of The State of Sarawak & Anor v. Chong Chieng Jen [2016] 5 CLJ 169 CA ***(refd)***

B *Kerajaan Negeri Terengganu & Ors v. Dr Syed Azman Syed Ahmad Nawawi & Ors [2013] 1 CLJ 107 HC* ***(refd)***

Knupffer v. London Express Newspaper Ltd [1944] AC 116 ***(refd)***

Mak Khuin Weng v. Melawangi Sdn Bhd [2016] 8 CLJ 831 CA ***(refd)***

Merdeka University Bhd v. Government of Malaysia [1981] CLJ 175; [1981] CLJ (Rep) 191 HC ***(refd)***

C *Mohd Azam Shuja & Ors v. United Malayan Banking Corp Bhd [1995] 2 MLJ 851 HC* ***(refd)***

Raub Australian Gold Mining Sdn Bhd v. Hue Shieh Lee [2019] 3 CLJ 729 FC ***(refd)***

RHB Bank Bhd v. Moon Trading Sdn Bhd [2014] 5 CLJ 443 CA ***(refd)***

Tai Choi Yu v. Curtin University of Technology Sarawak Campus, Malaysia & Anor [2004] 1 LNS 262 HC ***(refd)***

D *Tenaga Nasional Bhd v. Irham Niaga Sdn Bhd & Anor [2011] 1 CLJ 491 CA* ***(refd)***

Legislation referred to:

Defamation Act 1957, s. 6

Private Higher Educational Institutions Act 1996, s. 12(1)(c)

Rules of Court 2012, O. 18 r. 8(1)(a), (b)

E **Other source(s) referred to:**

Gatley on Libel and Slander, 12th edn, p 7

For the appellants - Mohd Izral Khairy & Zack Lim; M/s Izral Partnership

For the respondent - Jagjit Singh, Jasbeer Singh & M Uma Rani; M/s Jasbeer Nur & Lee

F *[Editor's note: For the High Court judgment, please see Asia Pacific Higher Learning Sdn Bhd v. Eagle One Investment Ltd & Ors [2016] 1 LNS 234 (affirmed in part).]*

Reported by S Barathi

JUDGMENT

G **Ahmadi Asnawi JCA:**

[1] In this judgment, the parties will be referred to as they were in the court below.

[2] The plaintiff is a private limited company incorporated under the Companies Act 1965, and is the registered owner and license holder of
H Lincoln University College ("LUC").

[3] The first defendant is the owner of an online news portal *www.antdaily.com.*, established by the second defendant.

[4] The third defendant is the writer working for the first and second
I

defendants.

[5] The third defendant wrote an article entitled "*Paid Holiday Part Of MMC Evaluation Visit*" and the article was published in *antdaily* website on 29 August 2013

[6] The full purport of the said article is reproduced below:

Paid Holiday Part Of MMC Evaluation Visit.

> Shah Alam: Making official trips abroad for the purpose of approving offshore medical programs seems to also translate to 'paid' holidays for some as further allegation of corruption were brought to the attention of the antdaily.
>
> The Malaysian Medical Council (MMC) visited three Ukrainian Universities in 2011 to approve offshore medical programs for local private institution Lincoln University (LUC). The official trip which involved three people was from February 26 to March 2, 2011.
>
> However, it is learnt that the member of the delegation was in Austria from February 13 to 16 and in Dublin from February 16 to 25, prior to arriving for his official duty in Ukraine.
>
> A source claimed that the whole trip, including that to Austria and Dublin, was financed by LUC.
>
> When contacted Malaysia Anti Corruption Commission investigation division director, Datuk Mustafar Ali said they are investigating the matter. Industry observers have questioned why the trip to Austria and Dublin was funded by an outside party if it is not official.
>
> A possible explanation is that the other destination were transits points, but one that involved a transit period of 13 days, instead of direct flights which involved a maximum 24 hour transit?
>
> Another questionable point is the fact that only one member of the delegation was actually an MCC member. The other two members were MMC secretary Dr. Wan Mazlan Mohamad Woojdy and an MMC legal officer. It is understood that the MMC legal officer has since left the Council. The MMC website says the secretary is responsible for day-to-day administration and operations of the Council. So why were the secretary and a legal officer part of the delegation sent to evaluate a medical degree? The offshore medical degrees offered by the three universities the delegation visited in Ukraine have since been approved for LUC.

[7] Hence, the plaintiff's claim is for the publication of the said article which they deem to be defamatory to the plaintiff, giving rise to the impression that the plaintiff was involved in corrupt practice and giving bribes in the form of sponsoring paid holidays to get recognition for LUC's

A medical program from MMC.

[8] As a result of the said defamatory article, the plaintiff had suffered a loss of reputation resulting in loss of potential students and lowering of LUC students' moral and staff.

B **[9]** The sole issue before the learned trial judge then was whether the said article as read is defamatory and leads to the imputation as alleged by the plaintiff enumerated in the paragraphs above.

[10] The learned trial judge found that there was no dispute that the said article was written by the third defendant and published online in the *antdaily* C website, a publication launched and managed by the first and second defendants.

[11] The learned trial judge also found that there was no dispute that the said article referred to the plaintiff.

D **[12]** Having referred to several factors adduced before the court, the learned trial judge, in his grounds of judgment finally concluded that (at p. 24, rekod rayuan (RR) bahagian A – jilid 1, para 16):

> ... the article in this case is written with malice to tarnish and lower the image of LUC in the eyes of the public. Apart from that this article is an E example of irresponsible and unprofessional journalism and that too from an award winning journalist. The article had succeeded in tainting the image of LUC which had resulted in a serious loss to LUC leading to the next issue of the amount of damages needed to compensate LUC for the loss suffered.

F **The Appeal Before Us**

[13] Learned counsel for the defendants submitted that the article was not meant for, nor was directed to the plaintiff but LUC. The plaintiff is the owner of LUC but the article made no mention of the owner. The owner was not even identified in the article. The article was all about LUC and not the G plaintiff.

[14] From a natural and ordinary reading of the article, the article has clearly and expressly referred only to LUC and not the plaintiff. There was no speculation nor uncertainty as to whom the article was making reference to.

H **[15]** It was also submitted that no evidence were led in the trial by the plaintiff to show that the article referred to the plaintiff nor were there any evidence to show that LUC and the plaintiff were one and the same.

[16] In addition, the plaintiff had failed to plead as to how the article had I referred to "Asia Pacific Higher Learning Sdn Bhd". It was neither pleaded that there was identification by way of innuendo nor that there was reference to the plaintiff by association to LUC. The pleadings clearly show a lack of nexus between the plaintiff and LUC, other than that LUC was owned by the

plaintiff.

[17] As such, it was submitted that the High Court erred in equating LUC with the plaintiff and/or that LUC is one and the same with the plaintiff when such is clearly not the case. This is equally so on account that the plaintiff is a company incorporated under Companies Act 1965, whereas LUC is a private higher educational institution established under the Private Higher Educational Institutions Act 1996. Both are separate entities established under different statutes. LUC is a body regulated under the said Act whereas the plaintiff is a body corporate which is separate from LUC.

[18] Further, all forms of correspondences were addressed to the CEO of LUC instead of the plaintiff company (see – letters from Malaysian Medical Council, Malaysian Qualification Agency, Ministry of Health and Ministry of Higher Education). Also LUC can enter into any contract under its own name and not under the plaintiff's name.

[19] Based on *Tai Choi Yu v. Curtin University of Technology Sarawak Campus, Malaysia & Anor* [2004] 1 LNS 262; [2004] 7 MLJ 375 and *Merdeka University Bhd v. Government of Malaysia* [1981] CLJ 175; [1981] CLJ (Rep) 191; [1981] 2 MLJ 356, learned counsel submitted that at its highest, the plaintiff is only a shareholder of LUC. Hence, it was contended that the plaintiff has no *locus* to institute the action against the defendants as the plaintiff was not named nor referred nor identified in the said article. The case warrants appellate intervention as the High Court's decision was premised upon the plaintiff's defective and insufficient pleadings.

Our Decision

[20] We were in agreement with the plaintiff's submission that the essence of the defendants' contention that the said article does not refer to the plaintiff and that LUC ought to be the proper plaintiff, leaving the plaintiff with no *locus* to institute the action against the defendants, is not pleaded at all. It appears that at all material times, the defendants have never brought up this issue, neither in its defence nor in the course of trial. It was raised for the first time only presently in the hearing before us.

[21] In order for the defence to raise the issue that the plaintiff's action is not maintainable on account of want of *locus*, it being the incorrect entity to sue, it is incumbent upon the defendants to mandatorily specify in their pleadings the alleged facts or acts leading to the said deficiency.

[22] Order 18 r. 8(1)(a) of the Rules of Court 2012 ("ROC 2012") is rather clear on the issue. It provides:

> **8. Matters which shall be specifically pleaded (O. 18 r. 8)**
>
> (1) A party shall in any pleading subsequent to a statement of claim pleaded specifically any matter, for example, performance, release, any relevant statute of limitation fraud or any fact showing illegality:
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable;
>
> (b) which if not specifically pleaded, might take the opposite party by surprise; or
>
> (c) which raises issues of fact not arising out of the preceding pleading.

[23] It is plainly clear that the defendants' position or contention is caught by the provisions of O. 18 r. 8(1)(a), that is to say, the defendants must specifically plead the facts or acts raising the illegality which they now allege makes the plaintiff's claim not maintainable. Likewise, the defendants' position is equally caught by O. 18 r. 8(1)(b), the prohibition not to take the opposite party by surprise.

[24] We have thoroughly scrutinised the defendants' pleading and found nothing therein resembling the requirements of O. 18 r. 8(1)(a) and/or (b) of the ROC 2012, contrary to the averments of learned counsel for the defendants that paras. 8 and 20 of the pembelaan terpinda defendan-defendan (at pp. 48 and 59 of tab 4, common core bundle of documents ("CCBD")) are sufficiently exhaustive to meet the said requirements of the court rules.

[25] Now, the said paragraphs of the pembelaan terpinda defendan-defendan provide as follows:

> 8. Perenggan 9 hingga 11 Penyataan Tuntutan dinafikan dan plaintif dikehendaki membuktikannya dengan ketat.
>
> …
>
> …
>
> 20. Defendan-defendan menegaskan bahawa plaintif tidak berhak mendapat sebarang relief yang dipohon dalam Pernyataan Tuntutan, termasuk sebarang tuntutan untuk gantirugi am dan/atau teladan dan/atau punitif, yang di plid dalam perenggan 27 atau sebaliknya.

[26] In our view, the said paragraphs were standard general denials of the plaintiff's claim, clearly devoid of specific details of the facts or issues leading to the premise that the plaintiff has no *locus* to institute the action against the defendants or that the plaintiff was not the correct entity to sue. The two paragraphs were mere denials, bereft of particularisation to sustain the defendants' aforementioned contention. There was simply non-

compliance of the requirements specified under O. 18 r. 8(1)(a) and/or (b) of the court rules.

[27] Both the plaintiff and the defendants were on common ground that these points were never before the trial judge but raised for the first time ever only presently before us.

[28] Nevertheless, learned counsel for the defendants submitted that the question of whether effect should be given to a point not raised in the court below but raised for the first time in the appellate court is one of discretion. In fortification of his submission, learned counsel relied upon the decision of this court in *Mohd Azam Shuja & Ors v. United Malayan Banking Corp Bhd* [1995] 2 MLJ 851 at p. 857, where the court stated:

> The question of whether effect should be given to a point not raised in the court below but raised for the first time in the appellate court is one of discretion. This was decided by the Federal Court in *Gulwant Singh v. Abdul Khalik* [1965] 2 MLJ 55. The principles on which the discretion may be exercised have been laid down in *Connecticut Fire Insurance Co v. Kavanagh* [1892] AC 473. Lord Watson, in his judgment at p.480 said:
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> > When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position than the courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea.

[29] Hence, we were next implored by learned counsel for the defendants that we ought to exercise our discretion in their favour in the interest of justice.

[30] We were of course mindful that the exercise of such discretion is subject to the overriding need of the court to do justice, as lucidly stated by the Federal Court through His Lordship Arifin Zakaria CJ in *Dato' Tan Chin Woh v. Dato' Yalumallai V Muthusamy* [2016] 8 CLJ 293; [2016] 5 MLJ 590:

> While it is true that the Court of Appeal can consider a point not expressly taken in the memorandum of appeal or argued in the court below based on the broad wording of s. 69(4) of the CJA and r. 18(2) of the Rules of the Court of Appeal 1994, this is subject to the overriding discretion of the court to do justice. Where the justice of the case requires a departure from the rule that parties should be bound by the grounds in the

A memorandum of appeal, the court may allow a new point to be argued (see *Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng & Anor* [1995] 1 MLJ 719; [1995] 3 CLJ 520; *Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457; [1995] 4 CLJ 127; *Mohd Azam Shuja & Ors v United Malayan Banking Corporation Bhd.* [1995] 2 MLJ 851; [1995] 1 CLJ 861). In so doing, it is however not the duty of the Court of Appeal,
B to invent or create a cause of action or a defence under the guise of doing justice for the parties as it is also trite that parties in litigation are bound by the four corners of their pleadings (see *RHB Bank Bhd*. (substituting *Kwong Yik Bank Bhd.) v. Kwan Chew Holdings Sdn. Bhd.* [2010] 2 MLJ 188). (emphasis added).

C What happened in the present case was that the Court of Appeal in the purported exercise of its discretion under s. 69(4) of the CJA had substituted the defence of qualified privilege with that of absolute privilege, a defence which was never pleaded nor raised before the High Court. *From the authorities set out earlier and the plain reading of s. 69(4) of the CJA, the power of the Court of Appeal is only to draw inferences of facts and to*
D *make an order which ought to have been made by the High Court. The power is essentially limited to making of inferences of facts from the facts as found by the High Court … .* (emphasis added).

[31] We have considered the facts and issues and were of the opinion that the defendants, by raising these issues only at the appellate level, were
E actually trying to appeal on issues that have never been earlier pleaded nor deliberated upon. The defendants, in doing so, in fact is creating or inventing a new defence. It caught the plaintiff off-guard and had deprived the plaintiff the opportunity to make known its case in full as questions in relation to *locus* were never directed to its witnesses and such issues were never raised in the
F course of the full hearing. The focus of the witnesses was also directed and intended or devised to respond to the averments in the narrative of the defendants' defence. In addition, it has also created a great disadvantage to the plaintiff as the documents that were tendered before the High Court only dealt with the issues raised in the defendants' defence.

G **[32]** We think that in all the circumstances of the case, this is not a proper case for us to exercise our discretion in favour of the defendants, that is to say, the defendants have no good ground to raise the issue of *locus* at this stage before us. It would have created a new defence for the defendants over which the plaintiff would not have been able to respond comprehensively. It would
H also have amounted to a transgression of the elementary principle of law that parties in litigation are bound by their pleadings.

[33] Both the litigants were also on common ground that LUC has no legal standing/capacity to take legal action on its own or under its own name.

I **[34]** Hence, in response to learned counsel for the plaintiff's submission in reply that being the owner of LUC and the entity that manages LUC, the

plaintiff has the *locus* to bring a suit for the defamation against the trading reputation of its brand (LUC brand) that has been tarnished by the defendants, learned counsel for the defendants made the further submission that based on the plaintiff's own authority, *Mak Khuin Weng v. Melawangi Sdn Bhd* [2016] 8 CLJ 831; [2016] MLJU 389, the remedy then available to the plaintiff as a corporate body is to sue the defendants for malicious falsehood and not defamation.

[35] This is on account that the damage allegedly suffered by the plaintiff was to the trading reputation of the brand belonging to the plaintiff company. Learned counsel for the defendants relied on the following passage of *Mak Khuin Weng*'s case (*supra*):

> Held
>
> (1) ...
>
> (2) Even though a corporation will not have a cause of action in defamation, it may have a cause of action for malicious falsehood, even though the libel or slander may not be defamatory. Malicious falsehood primarily protects property rights and the claimant must prove that the defendant published the words knowing them to be false. A company can bring an action in respect of words that damage its trading reputation provided that they can prove the words complained of had injuriously affected the company. This element must be pleaded and proved. (paras 10-12).

[36] It was thus further contended by learned counsel for the defendants that in submitting as such, the plaintiff had derailed and departed from its own pleadings. The plaintiff is now relying on the tort of malicious falsehood, whereas its original claim was for a claim of defamation.

[37] It was repetitiously stated that the plaintiff had failed to plead the nexus between the plaintiff and LUC other than that LUC was owned by the plaintiff company. In addition, the plaintiff did not plead that a reference to LUC also means a reference to the plaintiff company or that LUC was a brand belonging to the plaintiff company. Hence the plaintiff's change of claim for malicious falsehood at the appellate stage is rather misplaced.

[38] Again, the essence of the defendants' contention that the plaintiff has no *locus* to institute an action in defamation but only on account of malicious falsehood was not pleaded at all. It was raised for the first time presently in the hearing before us in response to the points raised by the plaintiff in rebuttal.

[39] Notwithstanding, we have thoroughly scrutinised *Mak Khuin Weng*'s case (*supra*) on whether a corporation or a company can institute an action in defamation or otherwise it can only institute an action in malicious falsehood. To better understand the decision in *Mak Khuin Weng*'s case

(*supra*), we have considered several authorities having reference on issues of similar nature.

[40] In *Kerajaan Negeri Terengganu & Ors v. Dr Syed Azman Syed Ahmad Nawawi & Ors* [2013] 1 CLJ 107, Yeoh Wee Siam J (as Her Ladyship then was) held that:

> [30] Accordingly, I adopt the principles laid down in *Derbyshire* (*supra*), and hold that the 1st plaintiff, which is the government of the State of Terengganu, is a public authority. As such it does not have a personal reputation to protect. Neither does it have a governing reputation, as in the case of a corporation or statutory body/authority, to protect. The State Government is duly elected by the members of the public through the democratic process and it should be transparent and accountable to the electorate. There should be freedom of speech and expression by members of the public in order to act as a check and balance on the executive and the government. It is therefore not in the interest of the public that the State Government be allowed to institute or maintain any action for libel or slander against any person. Otherwise, it would stifle constructive queries or comments which can contribute to and ensure good governance of the subjects by the State Government. There can be no financial loss suffered by the State Government even if defamatory statements are made against it by any person. In a situation where there is evidence of defamation, the offender can be prosecuted by the Public Prosecutor for criminal defamation under s. 499 of the Penal Code.

[41] In *Government of the State of Sarawak & Anor v. Chong Chieng Jen* [2016] 5 CLJ 169, David Wong Dak Wah JCA (dissenting), held that:

> (2) Section 3(1)(c) of the Civil Law Act 1956 is no impediment to our courts if and when they deem it fit to develop our common law. To ensure that art. 10 of the Federal Constitution is given its due importance, a common sense approach must be adopted and that is simply to start on a premise that constitutional rights of citizens must be jealously guarded in view of the fact that they are basic and fundamental in nature. These rights are also subject to a presumption in law that Parliament will not invade the same unless clear words are employed in Acts of Parliament. Nowhere in any Act of Parliament is there a specific provision allowing the Government to maintain an action for defamation to stifle this constitutional right of freedom of speech of citizens of the country. The significance of the absence of such a provision could not be underestimated. (paras 20, 23 & 27)

[42] Section 6 of the Defamation Act 1957 spells out:

> (1) In any action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage:

(a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or

(b) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication.

(2) Section 3 of this Act shall apply for the purposes of this section as it applies for the purposes of the law of libel and slander.

[43] Apart from the authorities referred to above in *Mak Khuin Weng*'s case (*supra*), we have also considered the following cases.

[44] In *Tenaga Nasional Berhad v. Irham Niaga Sdn Bhd & Anor* [2011] 1 CLJ 491, Abdul Malik Ishak JCA, delivering the judgment of the court, held that:

[36] The law may be stated as follows:

(a) once a certificate of incorporation has been issued by the Registrar of Companies, a company becomes a body corporate or better known as a corporation;

(b) **a company can be defamed** (*South Hetton Coal Company Limited v. North-Eastern News Association Limited* [1894] 1 QB 133, CA, [1891-4] All ER Rep 548, CA, 10 TLR 110; and *Barnes & Co Limited and Others v. Sharpe and others* [1910] 11 CLR 462); (emphasis added)

(c) **but a company cannot claim damages for injury to its feelings** (*Rubber Improvement Ltd. and Another v. Daily Telegraph Ltd, Same v. Associated Newspapers Ltd.* [1964] AC 234, 262, HL); (emphasis added)

(d) a company is a separate legal entity distinct from its members or directors (*Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor* [1997] 1 CLJ 529 FC);

(e) a company is a "legal persona just as much as an individual" (per Cave J in *In re The Sheffield and South Yorkshire Permanent Building Society In Liquidation* [1889] 22 Ch 470, 476); and

(f) by the process of the law, a company can be dissolved.

[45] In *RHB Bank Berhad v. Moon Trading Sdn Bhd* [2014] 5 CLJ 443, Abdul Malik Ishak JCA, delivering the judgment of the court, held that:

[57] **A company or corporation may institute a civil action for libel or slander just like an individual would** (*Great One Coconut Products Industries (M) Sdn Bhd v. Malayan Banking Bhd* [1985] 2 CLJ 390; [1985] CLJ (Rep) 482; [1985] 2 MLJ 469). It must be the company or corporation who is libelled or slandered and not the officials or its members (*South Hetton Coal Company Limited v. North-Eastern News Association Limited* [1894] 1 QB 133; [1891-1894] All ER Rep 548, CA). (emphasis added).

[58] A company or corporation cannot maintain an action for libel or

slander on behalf of its officers and directors in respect of disparaging words published or uttered against them. The officers and directors should institute the actions themselves.

[59] But if a company or corporation deals in trade, it would have a reputation to keep. On this basis, **it can institute an action for libel or slander in a situation where a statement made injures its trade or business** (*South Hetton Coal Company Limited v. North-Eastern News Association Limited* (*supra*)) provided it can show that the words are defamatory, the words refer to the company or corporation and the words are published (*Ayob bin Saud v. TS Sambanthamurthi* (*supra*). (emphasis added).

[46] Coming back to *Mak Khuin Weng*'s case, Hamid Sultan Abu Backer JCA, delivering the judgment of the court, held that:

(1) When it relates to defamation relating to limited company, the elements which need to be proved to raise a sustainable cause of action becomes more onerous in contrast to defamation action against a living person. The cause of action has a specific meaning and legal obligation to be met with by the plaintiff, failing which the action will be non-productive. A living person can sue and maintain a cause of action. This privilege is not accorded to public corporation and/or governmental bodies and/or institutions though they may have legal capacity to sue but will not have a cause of action in libel or slander (paras 7 & 8).

(2) Even though a corporation will not have a cause of action in defamation, it may have a cause of action for malicious falsehood, even though the libel or slander may not be defamatory. Malicious falsehood primarily protects property rights and the claimant must prove that the defendant published the words knowing them to be false. A company can bring an action in respect of words that damage its trading reputation provided that they can prove the words complained of had injuriously affected the company. This element must be pleaded and proved (paras 10-12).

(3) In order for a company to sue for libel or slander, the words complained of must injuriously affect the corporation or company as distinct from the individual which compose it. The injury relating to libel and slander must be in relation to its trading reputation which must relate to 'its pocket' and must not be related to misconduct of staff, etc. Further, if an element of public interest is involved, the criticism must be moderate and not malicious. The burden is on the company to prove the libel or slander had injuriously affected the company. This element must also be pleaded and proved (para 18).

(4) The plaintiff had not satisfied the threshold requirement for limited company to maintain an action in libel. There was no finding by the trial judge that the words complained of had injuriously affected the company in relation to its pocket. Taking a holistic view of the pleadings, facts and

the law as well as taking note that there were some elements of public interest involved in the instant case, the appeal was meritorious (paras 21 & 22).

[47] Having considered the above authorities, we have come to the premise that the ruling in *Mak Khuin Weng*'s case (*supra*) presupposes that:

(i) a limited company or corporation may institute a civil action either for defamation and/or malicious falsehood;

(ii) a public corporation, governmental bodies or institution cannot institute a civil action for defamation but it may institute a civil action for malicious falsehood;

(iii) a civil action for defamation by a limited company or corporation is restricted in nature to trading reputation that the words complained of had injuriously affected the company in relation to its pocket.

[48] This is in line with the decision of the Federal Court in *Raub Australian Gold Mining Sdn Bhd v. Hue Shieh Lee* [2019] 3 CLJ 729, wherein the appellant company had instituted an action against the respondent both for defamation and malicious falsehood in respect of two articles issued by the respondent. *Mak Khuin Weng*'s case (*supra*) was referred to by the Federal Court in considering the action of defamation by the appellant company which was later dismissed for not fulfilling the elements, that is to say amongst others, that the first article was not defamatory and in respect of the second article it was considered hearsay on account that the maker (journalist) who made the recording was not called to testify and not because the appellant company has no *locus* to institute an action for defamation.

[49] The Federal Court made no mention that malicious falsehood is the sole cause of action or remedy available to corporate bodies where the words complained of had injuriously affected its trading reputation *vis-à-vis* principally in relation to "its pocket".

[50] Hence, the Federal Court had explicitly affirmed that both causes of action, that is to say defamation and malicious falsehood, which are distinct causes of action, are valid options available to corporate bodies to choose from to protect its trading reputation against parties determined, whether intentionally or otherwise, to tarnish the same.

[51] Therefore, we find that the defendants' contention that the plaintiff has no *locus* to institute an action for defamation against the defendants and that its only recourse lies primarily on an action for malicious falsehood is without merit. The plaintiff has rightfully instituted and maintained such action for defamation against the defendants. Since the plaintiff did not plead nor make any claim for damages to its injured trade reputation based on

malicious falsehood, the natural consequence is simply that the plaintiff is estopped and thus cannot rely and is not entitled to claim the same under that cause of action.

[52] At this stage, it is pertinent to note the difference between defamation and malicious falsehood.

[53] In respect of the law on defamation, the Federal Court in *Raub Australian Gold Mining Sdn Bhd* (*supra*) stated:

> [29] Defamation is committed when the defendant publishes to a third person words or matters containing untrue imputation against the reputation of the plaintiff. Liability for defamation is divided into two categories, that of libel and slander. If the publication is made in a permanent form or is broadcast or is part of a theatrical performance, it is libel. If it is in some transient form or is conveyed by spoken words or gestures, it is slander (see: *Gatley on Libel and Slander*, 9th edn at p. 6).
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> [30] In *Ayob Saud v TS Sambanthamurthi* [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321, His Lordship Mohamed Dzaiddin J (as he then was) has clearly laid down the necessary procedure in establishing claim for libel (with which we agree), when he said at p. 155:
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> > In our law on libel, which is governed by the Defamation Act 1957, the burden of proof lies on the plaintiff to show (1) the words are defamatory; (2) the words refer to the plaintiff; and (3) the words were published. Where a defence of qualified privilege is set up, as in the present case, the burden lies on the defendant to prove that he made the statement honestly, and without any indirect or improper motive. Then, if he succeeds in establishing qualified privilege, the burden is shifted to the plaintiff in this case to show actual or express malice which upon proof thereof, communication made under qualified privilege could no longer be regarded as privileged: *Rajagopal v. Rajan*.
>
> [31] In other words, the plaintiff must prove three elements of the tort of defamation, which are:
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> (i) the plaintiff must show that the statement bears defamatory imputations;
>
> (ii) the statement must refer to or reflect upon the plaintiff's reputation; and
>
> (iii) the statement must have been published to a third person by the defendant.

[54] Defamation primarily protects reputation and there is no obligation to

prove malice. The statement is presumed to be false and the defendant is enjoined to prove it to be true. The purpose of the award is to vindicate the plaintiff's reputation. It is to compensate him for the injury to his feelings.

[55] On the other hand, malicious falsehood is primarily about protection of property rights. Unlike a natural person, a company is devoid of feelings capable of being injured but verily had reputation to protect/defend. Thus a company can bring an action in respect of words that damage its trading reputation. Hence the compensation awarded is in respect of the injuries suffered by the company upon its reputation resulting from the words uttered or published by the defendant as opposed from individuals or staff of the company, being its composition. Here, the claimant must prove that the defendant published the words knowing them to be false. For a company to bring an action in respect of the words that damage its trading reputation, this must be pleaded and provide proof that the words complained of had injuriously affected the reputation of the company.

[56] Thus, the Federal Court in *Raub Australian Gold Mining Sdn Bhd* (*supra*) had again succinctly crystallised the law on malicious falsehood in the following manner:

> [39] In order to establish a claim under malicious falsehood, it is trite law that the plaintiff bears the burden of proving the following elements:
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> (i) that the defendant published about the plaintiff words which are false;
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> (ii) that the words were published maliciously; and
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> (iii) that special damage followed as the direct and natural result of the publication.
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> (see: *Tan Chong & Son Motor Co Sdn. Bhd. v Borneo Motors (M) Sdn. Bhd. & Anor* [2001] 4 CLJ 296; [2001] 3 MLJ 140; *Ratus Mesra Sdn. Bhd. v. Shaikh Osman Majid & Ors* [1999] 8 CLJ 499; [1999] 3 MLJ 529; *Kaye v. Robertson* [1991] FSR 62 (EWCA)).
>
> [40] "Malice" has been judicially interpreted by the courts as being reckless, unreasonable, prejudice or unfair belief in the truth of the statement. "Malice" may be established by showing that the defendant did not believe in the truth of what he uttered (see: *Horrocks v. Lowe* [1974] 1 All ER 662 and *Watt v. Longsdon* [1930] 1 KB 130 at 154, [1929] All ER 284 at 294).
>
> [41] As defined in the *Osborn's Concise Dictionary* (7th edn.), the word "malice" means:
>
> > III-will or evil motive: personal spite or ill-will sometimes called actual malice, express malice or malice in fact. In law an act is malicious if done intentionally without just cause or excuse. So

A long as a person believes in the truth of what he says and is not reckless, malice cannot be inferred from the fact that his belief is unreasonable, prejudiced or unfair (*Horrocks v. Lowe* [1972] 1 WLR 1625).

[42] In law, an act is malicious if done intentionally without just cause or excuse. So long as a person believes in the truth of what he says and is not reckless, "malice" cannot be inferred from the fact that his belief is unreasonable, prejudiced or unfair (see: *Anne Lim Keng See v. The New Straits Times Press (M) Bhd. & Anor And Other Appeals* [2008] 6 CLJ 697; [2008] 3 MLJ 492; *Horrocks v Lowe* (*supra*).

C **Whether The Article Is Defamatory**

[57] Coming back to the instant appeal, foremost the plaintiff must show that the article in issue is defamatory or otherwise carry some sort of defamatory imputation.

[58] In determining whether the article is defamatory, the learned trial judge took the approach that the article must be read as whole in an objective manner using the standard of an ordinary reasonable man. He also took into account the truth or otherwise of its contents and also the introduction and conclusion mentioned in the article as indicative of what is trying to be conveyed by the author. In addition, the intention of the author in writing the article can be gauged upon whether efforts were taken to verify its contents – see para. 9 p. 20, grounds of judgment, jilid 1, RR.

[59] We opined that the aforesaid test applied by the learned trial judge is consistent with trite law, that is to say, it must first be considered what meaning the words would convey to an ordinary person and secondly it must be equally considered whether a reasonable man would be likely to understand that in a defamatory manner under the circumstances in which the words were published – see *Raub Australian Gold Mining Sdn Bhd* (*supra*).

[60] The learned trial judge proceeded to consider that the title of the article ("Paid Holiday Part Of MMC Evaluation Visit") itself is a giveaway, attracting attention in a negative manner inferring impropriety. It seeks to draw an unfavourable impression about the plaintiff.

[61] The learned trial judge also took issue when the third defendant failed to explain why she proceeded to write negatively about Dr Wan Mazlan's participation in the visit based upon suspicion that Dr Wan Mazlan was not a medical doctor even though the third defendant could not verify the reason for Dr Wan Mazlan's participation.

[62] The learned trial judge also found the allegation in the article that LUC sponsored the trip of a member of the delegation to Dublin and Austria to be inaccurate and an unverified fact. The third defendant also admitted not verifying this fact from LUC.

[63] The learned trial judge also took issue with the third defendant's admission that when she used the phrase "industry observers", she was only referring to herself, her editor and her source. According to the learned trial judge, this is a false statement, to convey that large members of society were apprehensive about widespread corruption in the recognition of education degree, when in fact there is no evidence of the same.

[64] Mustafar Ali, an MACC officer denied knowing the third defendant or giving her any information contrary to the third defendant's evidence that she had called upon this officer to confirm whether there was an ongoing investigation against LUC and the officer had answered in the affirmative. The officer had also said that it was not his practice to give information over the telephone especially to a person he had not known. The learned judge believed this witness.

[65] In all the circumstances of the case, we were with the learned trial judge when at the end of the day he concluded that the article was written with malice to tarnish and lower the image of LUC in the eyes of the public. In our view, having considered the circumstances and context in which the article was used and published, there can be no doubt that the impugned article was defamatory in nature or otherwise had carried a defamatory imputation against the plaintiff. It would have satisfied the requirements of the three tests of what amounted to defamatory imputation as set out in *Gatley on Libel and Slander*, 12th edn., p. 7, as follows:

(i) Would the imputation tend to lower the plaintiff in the estimation of right-thinking members of society generally?

(ii) Would the imputation tend to cause others to shun or avoid the claimant?

(iii) Would the words tend to expose the claimant to hatred, contempt or ridicule?

The test is an objective test. Hence, viewed objectively, under the circumstances in which the article was published, it is most likely that a reasonable man would understand the article in a defamatory way. As pointed out by the learned trial judge, the article was riddled with unverified facts, falsity, inaccuracies, false statements and so forth, designed to draw an unfavourable impression of the plaintiff and lower the plaintiff in the estimation of right-thinking members of society generally.

[66] In any event, there is no submission from the defendants that the said article was not defamatory at all.

Whether The Article Was Published Of And Concerning The Plaintiff

[67] Having proved that the said article is defamatory, the plaintiff will next have to prove that the defamatory article was published of and concerning the plaintiff. The words must be capable of referring to the plaintiff.

[68] The Privy Council in *Knupffer v. London Express Newspaper Ltd* [1944] AC 116, had stated:

> It is an essential element of the cause of action for defamation that the words complained of should be published 'of the plaintiff', where he is not named the test of this is whether the words would reasonably lead people acquainted with him to the conclusion that he was the person referred to. The question whether they did so in fact does not arise if they cannot in law be regarded as capable of referring to him.

[69] The learned trial judge in a one-liner stated that there is also no dispute that the article referred to the plaintiff – see para 7, p. 17, jilid 1, RR.

[70] Notwithstanding the same, we agreed with the learned trial judge's findings on account that the defendants have never brought or raised this issue, neither in its defence nor in the course of trial.

[71] We have scrutinised the amended defence of the defendants in its entirety (see – Tab 4, pp. 46 to 60, common core bundle of documents (CCBD), and its translation at pp. 61 to 74 of the same) and found, save for general denials, nothing to suggest that the defendants were in fact disputing that the impugned article indeed referred to the plaintiff or was published "of the plaintiff" but LUC, as contended in the defendants' submissions.

[72] Further, the evidence shows that LUC was established pursuant to the Private Higher Educational Institutions Act 1996 ("PHEIA 1996").

[73] The evidence also showed that in accordance with the requirement of PHEIA 1996, the plaintiff company was incorporated to establish LUC (see – Tab 6, CCBD). Thereafter the Ministry of Higher Education issued a certificate to recognise the establishment of LUC by the plaintiff (see – Tab 7, CCBD).

[74] By letter *vide* Tab 8 of CCBD, the Ministry of Higher Education confirmed that the plaintiff is the owner of LUC, replete with its own Certificate of Registration (see – Tab 9, CCBD).

[75] The evidence also revealed that the plaintiff company's memorandum and articles of association had verily complied with the requirement stipulated under s. 12(1)(c) of PHEIA 1996, that is to say, that "the sole object of applicant's memorandum and articles of association shall be to establish and manage private higher educational institution and shall contain provisions for such matters as may be prescribed".

[76] Further, the company search of the plaintiff also revealed that the nature of the plaintiff's business is solely "Educational And Training Services" (see – Tab 6, CCBD).

[77] In the event, we were in agreement with the plaintiff's submission that the plaintiff is the registered owner and license holder of LUC as required under the Act. Hence, any monetary damage suffered by LUC due to the injury to its trade reputation is wholly suffered by the plaintiff.

[78] Given that the plaintiff was not named in the impugned article, nevertheless, the principle enunciated by the Privy Council in *Knupffer v. London Express Newspaper Ltd* (*supra*) that the applicable test is whether the words would reasonably lead people acquainted with him (here the plaintiff) to the conclusion that he (the plaintiff) was the person referred to (in the article) did indeed apply.

[79] Having regard to the peculiar relationship between LUC *vis-à-vis* the plaintiff, it is our considered view that the article would reasonably lead those acquainted with the plaintiff, such as those in the same business or industry as the plaintiff, LUC's students, would be students and other stakeholders would invariably conclude that the impugned article indeed referred to the plaintiff. Likewise, the article would lead to the tendency that people who were acquainted with the plaintiff would come to the conclusion that the article verily referred to the plaintiff.

Whether The Article Was Published To A Third Party By The Defendants

[80] Finally, the plaintiff must now prove that the impugned article which is the subject of the plaintiff's complaint has been published by the defendants to any third party.

[81] Reference is again made to *Raub Australian Gold Mining Sdn Bhd* (*supra*). In para. [37] the court stated:

> [37] 'Publication' means making the defamatory statement known to some other person other than of whom it is written or spoken. The statement must be published to a third party (see: *S Pakianathan v. Jenni Ibrahim & Another Case* [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233). The uttering of a libel to the party libelled is no publication for the purpose of a civil action (see: *Wenahak v. Morgan* [1888] 2 QBD 634). The fundamental principle is that the statement must be communicated to a third party in such manner as to be capable of conveying the defamatory imputation about the plaintiff (see: *Gatley on Libel and Slander*, 9th edn. at p. 134).

[82] Both the parties made no submission in respect of this element of the

A tort of defamation. There appears to be a concession by the defendants before us that the said article was published by the defendants to a third party. Hence, it is given that this element is proven.

Conclusion

B **[83]** Having said that, we opined that the plaintiff had indeed proven its case. There is no reason for us to interfere with the findings of the learned trial judge both on the facts and law. Hence, we dismissed the appeal against liability mounted by the defendants without more.

[84] In respect of the quantum of damages, we opined that the award C handed down by the learned judge is rather on the high side in all the circumstances of the case. There appeared to have been no basis to justify the amount. Therefore, we allowed the defendant's appeal in respect of the same.

[85] Hence, the quantum of damages are varied and substituted with the amount below:

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(i) general damages reduced to RM500,000.

(ii) exemplary damages reduced to RM300,000

[86] We also made no order as to costs, whereas the costs awarded by the High Court amounting to RM50,000 would be maintained. Order E accordingly.

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